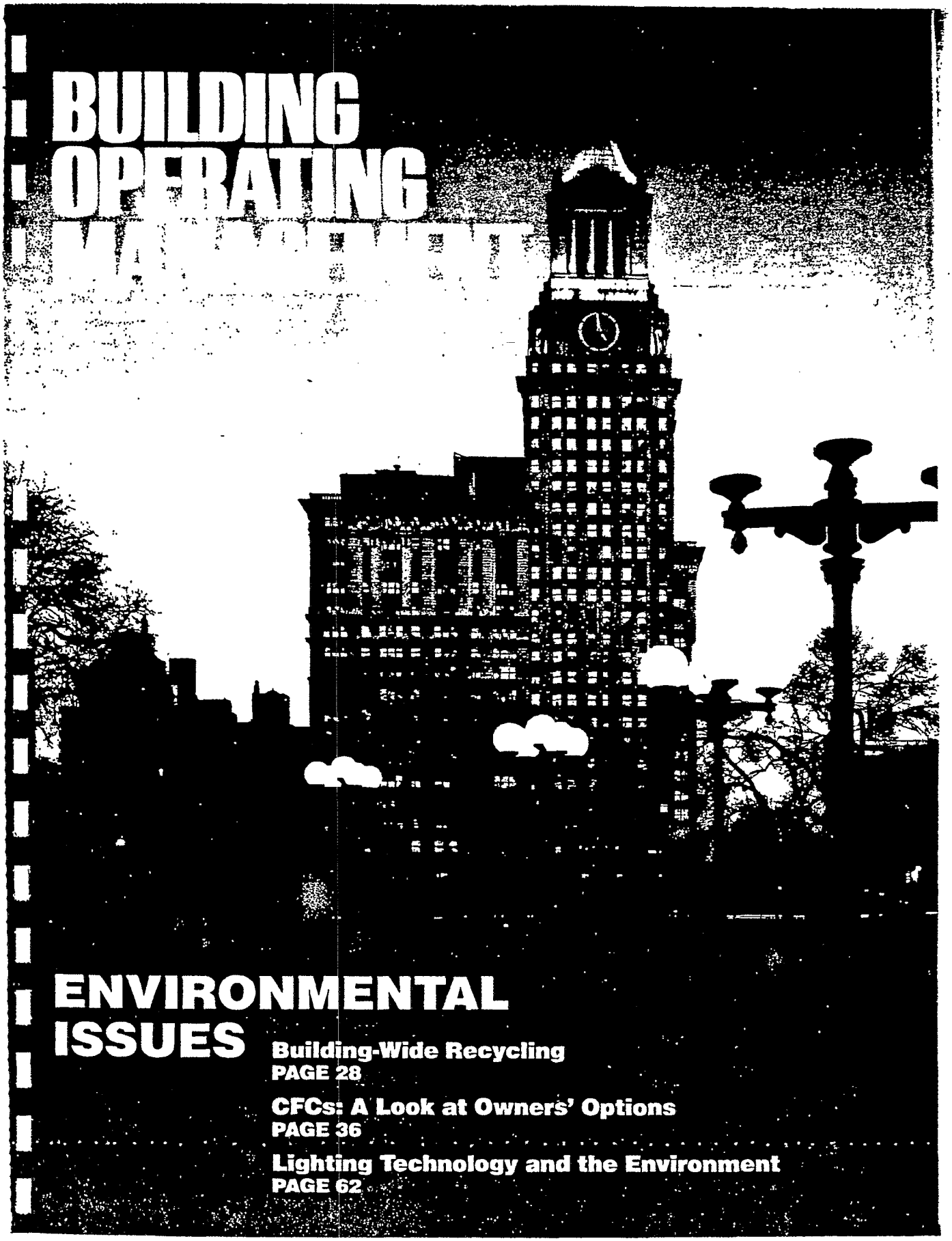


PROTECTING OCCUPANTS – AND OWNERS – FROM INDOOR AIR PROBLEMS

As lawsuits related to sick building syndrome rise, owners find that improving air quality reduces liability

by LAURENCE S. KIRSCH and BONNIE Y. HOCHMAN

As public attention has focused on indoor air quality, building owners have learned of reported claims of health problems experienced by building occupants. What some building owners may not know, however, is that allegations of indoor air quality problems can be unhealthy for themselves as well — even if they never set foot in the building.

Complaints concerning the quality of the indoor air can have a significant effect on the financial health of even the most prosperous owners. This is the case because building owners face an increasing risk that they will be the target of a lawsuit by a building occupant charging that myriad health effects — potentially ranging from headaches to allergic sensitization to miscarriages — have been caused by poor indoor air quality.

During the past several years, building occupants have filed an increasing number of lawsuits of just this kind, claiming they are suffering from "Sick Building Syndrome" (SBS). And unable to establish that any particular party is at fault, sick building plaintiffs and their attorneys have chosen to sue a large number of parties — including building owners, architects, contractors, manufacturers of products used in buildings, and even the companies that have tested and attempted to mitigate indoor air quality problems.

In a typical sick building case, individuals in the same building believe they are experiencing similar symptoms — such as coughing, headaches, respiratory irritation, dizziness or nausea upon entering the building — and that such symptoms are associated with their presence in the building.

Such symptoms may be caused by improper ventilation, bacteria or other microorganisms in a ventilation system, ventilation of outdoor pollutants into the building through air intake ducts, chemicals used in the office environment or even the materials comprising the building itself or its furnishings. These symptoms, however, could also be caused by generalized worker dissatisfaction or the flu.

Limited worker's compensation

Thus, sick building cases are difficult to prosecute and just as difficult to defend. Sick building lawsuits are being directed at building owners because state workers' compensation laws typically bar workers from suing their employers directly for work-related health conditions. The money a worker can recover under a worker's compensation program, even if recovery is allowed, are limited.

Thus, employees who believe that they have been injured by sick buildings have felt compelled to seek alternative means of recovery against parties other than their employer. Unfortunately, building owners can be convenient targets.

From the perspective of the building owner such lawsuits can be horribly unfair. Few owners would intentionally allow their buildings to be maintained in an unsafe manner, and in most buildings that have been found to contribute to occupants' health problems, the owners have been operating these buildings in full compliance with federal, state and local law. Under these circumstances, it is questionable why owners should be forced to defend themselves against sick building lawsuits.

The potential bases for these lawsuits vary almost as much as the potential defendants. Indoor air pollution cases have relied on theories such as negligence, breach of express or implied warranties, strict liability, landowner/occupier liability, assault, battery, nuisance, infliction of emotional distress, misrepresentation, fraud, as well as claims for other equitable relief.

The following sections will first discuss certain examples of indoor air litigation, of which building owners should be aware, and next provide certain suggestions for avoiding or minimizing the damage caused by sick building lawsuits.

SBS lawsuits

One recent Iowa case illustrates many of the difficulties inherent in sick building cases. *Bloomquist v.*

Wapello County, et al. is the first sick building case to ever reach a jury. In *Bloomquist*, a jury awarded $1 million dollars to three workers and their spouses to compensate them for injuries allegedly suffered as a result of repeated exposure to various pesticides in an office with a faulty heating, ventilation and air conditioning (HVAC) system. After the trial, however, the judge rejected the jury's verdict and issued a directed verdict in favor of the defendants on the ground that the plaintiffs had failed to prove that either the pesticides or the faulty HVAC system had caused the injuries sustained.

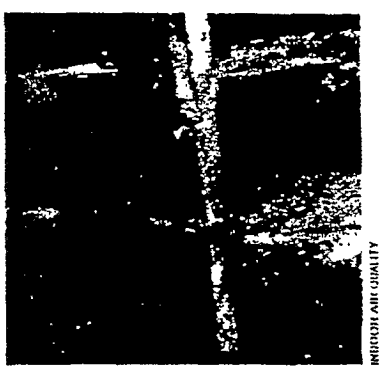
In another case, which has withstood motions for summary judgment, a Los Angeles trial court this fall will examine allegations of negligence, strict liability, implied and express warranties of fitness and merchantability, fraud, conspiracy and breach of covenant of quiet enjoyment.

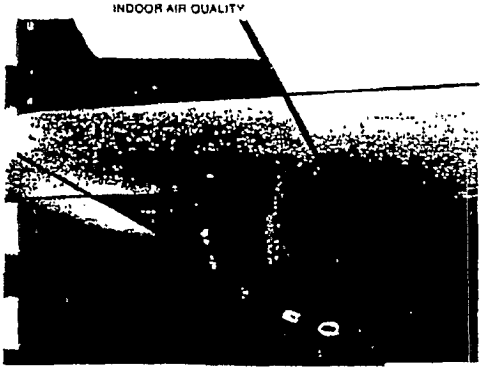
In *Call v. Prudential Insurance Co.* several tenant corporations and their employees sued the landlord, building owner, architects, engineers, contractors and 250 unknown defendants to recover personal as well as business injuries that they said resulted from SBS. The plaintiffs claimed that the HVAC system was faulty and the building was permeated by toxic fumes, chemicals and substances.

One of the first lawsuits filed as a result of SBS was *Buckley v. Kruger-Benson-Ziemer*. In this case, a computer programmer sued approximately nine named and 280 unnamed defendants for the injuries he allegedly sustained from exposure to indoor pollutants in his poorly ventilated, tightly enclosed workplace.

The plaintiff said that the various defendants — including architects, contractors, mechanical engineers, heating and air conditioning consulting engineers, manufacturers, distributors, sellers and installers of the air conditioning equipment, carpentry and floor tiles as well as the manufacturers, sellers and distributors of "certain chemicals commonly used in offices, including but not limited to toners used in duplicating machines" — knew or reasonably should have known and had a duty to warn all persons including the plaintiff of the poor air ventilation and the dangerous chemicals and ▶

Owners may feel the effects of steps taken — or not taken — to protect building occupants from poor indoor air quality. Unclean air ducts might be evidence of a lack of concern, while testing might show an attempt to prevent health problems.





Regular duct cleaning can help prevent air quality problems.

INDOOR AIR QUALITY

toxins in the air, carpet, tile and office machinery.

The plaintiff claimed liability based upon negligence, strict liability and infliction of severe emotional distress. The case finally settled before trial for a purported $622,500, but only after extensive, protracted discovery.

Similarly, in *Stillman v. South Florida Savings & Loan*, a bank tenant asserted indoor air pollution-related counterclaims against a landlord after vacating an allegedly sick building and being sued for breach of lease. The bank asserted that it vacated the building after having demanded that the landlord investigate and alleviate the indoor air pollution that was causing its employees to suffer from SBS.

The bank claimed that the landlord's failure to maintain properly the air conditioning system was a breach of the bank's lease. The bank also asserted that the indoor air quality problems had breached the bank's right to the quiet enjoyment of its premises, constituted a constructive eviction from the property, and was the result of the landlord's negligence. Three years after being filed, this case remains unresolved.

In *Henley v. Blomfeld Co.*, several state employees sued the architect, contractors and owner of an office building to recover damages for the personal injuries they suffered from the alleged microbiological contaminants in the carpeting and HVAC system.

While the building had been investigated for indoor air pollution by the State Department of Labor in 1985 after a more than five-year occupancy, and 11 employees were removed due to the severity of their symptoms, the building was not evacuated until February of 1986 when the problem allegedly became so severe that an employee collapsed at her desk.

The allegations are based on strict liability, negligence, recklessness and breach of express and implied warranties. This case was recently settled on undisclosed terms.

These are only a few examples of the numerous lawsuits that have been brought under sick building-type theories, and illustrate both the broad scope of potential liability and the pressures to settle that can be inherent in such cases.

How building owners can protect themselves

Given the significant potential for liability that may be encountered from sick building claims, it would seem prudent for building owners to take measures to protect themselves. Through the following general suggestions, which must be evaluated carefully with counsel in the context of each specific situation, building owners may help avoid finding themselves as the target of a sick building lawsuit or, if they are sued, may help limit their potential liability:

1) Inform responsible employees about SBS and establish a focal point to which all indoor air complaints should be directed. Building owners cannot protect themselves against a sick building complaint if they do not learn of it in a timely manner. Many employee, customer or tenant complaints are not taken seriously because they are directed to individuals who lack knowledge about the problem or lack authority to cure it. Moreover, if complaints by different building occupants are directed to different management personnel, the building owner may not learn of any emerging patterns.

Implementing a process which ensures that SBS complaints are directed to specified individuals who have knowledge and authority to respond may alleviate the escalation of problems.

2) Take pre-emptive measures where possible. The best way to limit liability is to discover and remedy a potential problem before complaints arise. Indoor air testing and diagnosis not only eliminate problems before they develop, but also may serve as evidence of reasonable efforts to guard against poor indoor air quality.

3) If any problems are discovered, take steps to deal with and document them. Just as preemptive measures may be used as evidence of non-negligence, an owner's failure to address a known existing air pollution problem may be used as evidence to support a punitive damage claim. If a problem becomes apparent, it is important that an owner take steps to remedy it. A record of the mea- ▶

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sures taken should be kept.

4) Indoor air quality issues should be considered during the performance of regular building management activities. Certain activities — construction, renovation, operating ventilation systems or manufacturing products — may affect indoor air quality. By considering the potential impact of these activities, an owner can most likely avoid problems.

5) Provide for contractual protection. Where it is appropriate, seek contractual protection, such as releases and indemnities from tenants, suppliers or subcontractors.

6) Keep informed of standards and guidelines and comply with them. Compliance with standards may provide a shield from liability. By participating in the efforts of trade associations and organizations in developing voluntary standards, building owners will be better informed of the rapidly developing field of indoor air quality. In addition, they will be better able to document their reasonable care in addressing indoor air quality issues.

7) Recognize legal problems and seek legal advice. Given the scientific, medical and technical aspects of indoor air quality issues, it is easy to overlook their legal aspects. Indoor air complaints have the potential to escalate into serious legal problems, and such complaints should be treated accordingly. By seeking competent legal advice when faced with an indoor air complaint, an owner may immediately begin taking appropriate steps to protect his or her interests.

For example, a lawyer may be able to assist in the proper handling of the complaint and in the handling of similar complaints from other employees. A lawyer can help protect a building owner from making potentially damaging admissions based on preliminary information that may prove incorrect. The adverse effect of an admission may be difficult to reverse. In addition, a lawyer may be able to make useful recommendations on the handling of any remedial efforts to ensure that such efforts are handled confidentially and in such a manner that the owner's interests are not compromised.

Building owners are being forced by the threat of liability to understand indoor air quality issues. By learning more about the means of legally protecting themselves against such liability, owners will be better prepared to address this emerging issue of the 1990s. BOMI